

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBERT C. SMITH,)	
)	
Petitioner/Appellant,)	2 CA-CV 2008-0119
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
PIMA COUNTY ANIMAL CONTROL,)	Rule 28, Rules of Civil
)	Appellate Procedure
Real Party in Interest/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20082170

Honorable Gus Aragón, Judge

AFFIRMED

Roberta Jensen Tucson
Attorney for Petitioner/Appellant

Barbara LaWall, Pima County Attorney
By Sean E. Holguin Tucson
Attorneys for Real Party in
Interest/Appellee

B R A M M E R, Judge.

¶1 Appellee Pima County Animal Control (the county) filed an action in Pima County Justice Court seeking the forfeiture of dogs belonging to appellant Robert Smith. When Smith moved to dismiss the forfeiture action, the justice court denied the motion and determined that Smith had forfeited the dogs to the county. Smith then petitioned the superior court for special action relief and now appeals that court’s refusal to accept jurisdiction of his petition. We affirm.

Factual and Procedural Background

¶2 The facts relevant to our disposition of Smith’s appeal appear undisputed. The parties assert that, in February 2008, Smith was arrested and charged with dog fighting in violation of A.R.S. § 13-2910.01. Following his arrest, “someone at the jail” served Smith with an “Impoundment and Bond Notice,” which informed him his dogs “w[ould] be deemed forfeited to the Pima Animal Care Center” unless he posted a \$12,650 bond within ten days of the notice and successfully contested the impoundment and forfeiture at an order to show cause (OSC) hearing. Although the county apparently had not yet filed a complaint in the justice court formally seeking the forfeiture of Smith’s dogs, he nonetheless moved to dismiss “the impoundment and forfeiture of his dogs, or, alternatively, request[ed] a waiver of the bond.” The court filed Smith’s motion under the criminal cause number assigned to his indictment and scheduled a hearing on the motion. Approximately one week after Smith had filed his motion, the county filed, under a civil cause number in justice court, a complaint for the forfeiture of Smith’s dogs and an application for an OSC hearing.

¶3 Before the hearing on Smith’s motion to dismiss, the county filed a supervening criminal indictment in Pima County Superior Court. At the hearing on Smith’s motion, the justice court determined that, despite the supervening indictment, it retained jurisdiction over Smith’s motion, which related to the county’s civil complaint. The court declined Smith’s request to correct the cause number assigned to his motion to dismiss and denied the motion.

¶4 After that hearing, the county filed a “Withdrawal of Complaint for Order to Show Cause and Request to Vacate Hearing,” asserting no hearing was necessary because Smith had already forfeited his dogs by failing to post the required bond. The justice court did not acknowledge the county’s “[w]ithdrawal” and held the previously scheduled OSC hearing in Smith’s absence. At that hearing, the court agreed Smith had forfeited his dogs to the county and vacated further proceedings.

¶5 Smith then filed a petition for special action in the superior court, arguing the justice court had abused its discretion when it “refused to renumber the [motion to dismiss] as a civil case when it had accidentally been assigned the criminal case number.” He further asserted that, because the supervening indictment had divested the justice court of jurisdiction over the criminal case against him, and because the justice court had chosen to “keep [his motion] under the criminal case number,” it lacked jurisdiction to rule on it. The superior court declined jurisdiction of the special action. This appeal followed. We have jurisdiction over Smith’s appeal pursuant to A.R.S. § 12-2101(B) and Rule 8(a), Ariz. R. P.

Spec. Actions. *See State v. Oppido*, 207 Ariz. 466, ¶ 3, 88 P.3d 180, 181 (App. 2004); *see also M & M Auto Storage Pool, Inc. v. Chem. Waste Mgmt., Inc.*, 164 Ariz. 139, 141, 791 P.2d 665, 667 (App. 1990) (superior court’s order disposing of special action “a final order in a special proceeding commenced in superior court for purposes of A.R.S. § 12-2101(B)”).

Discussion

¶6 Exercise of special action jurisdiction is appropriate when there is no equally plain, speedy, or adequate remedy by appeal and the issue presented is a purely legal question of first impression, of statewide importance, and likely to arise again. *See Blake v. Schwartz*, 202 Ariz. 120, ¶¶ 7-8, 42 P.3d 6, 8 (App. 2002); Ariz. R. P. Spec. Actions 1(a). “Acceptance of special action jurisdiction is highly discretionary.” *State ex. rel. Romley v. Fields*, 201 Ariz. 321, ¶ 4, 35 P.3d 82, 84 (App. 2001). And, although the parties spend the majority of their briefs arguing the merits of Smith’s claims, because the superior court did not address the merits but instead declined to accept jurisdiction of the special action, we likewise do not reach the merits on appeal. Rather, “the sole issue before us [is] whether that court abused its discretion when it declined to accept jurisdiction.” *State v. Johnson*, 184 Ariz. 521, 523, 911 P.2d 527, 529 (App. 1994); *see also Bilagody v. Thorneycroft*, 125 Ariz. 88, 92, 607 P.2d 965, 969 (App. 1979).

¶7 As noted above, Smith contended in his petition for special action that, because the justice court had declined to renumber his motion to dismiss, it lost jurisdiction to rule on the motion after the county had filed the supervening indictment. He asserted the superior

court should accept jurisdiction over the action because a “speed[ier] determination [wa]s needed” than that provided by appeal, the issue he had raised was a purely legal question, and the issue was of county-wide concern.¹ But our record shows Smith failed to provide the superior court with a copy of the initial criminal indictment, the civil complaint, and the supervening indictment. Without these documents, the superior court could not properly have determined whether any supervening indictment had indeed divested the justice court of jurisdiction to hear Smith’s motion. *See Grand v. Nacchio*, 214 Ariz. 9, ¶ 22, 147 P.3d 763, 771-72 (App. 2006) (special action jurisdiction appropriate when record adequate to decide legal questions); *see also In re Jury Selection Process*, No. 1 CA-CV 08-0028, ¶ 13, 2009 WL 786908 (Ariz. Ct. App. Mar. 26, 2009) (declining special action jurisdiction when record incomplete); Ariz. R. P. Spec. Actions 7(e) (petition shall include “appendix of documents in the record before the [lower] court that are necessary for a determination of the issues raised by the petition”).

¹On appeal, Smith additionally argues that the superior court should have accepted jurisdiction of his special action because, he contends, the justice court abused its discretion in holding the OSC hearing after the county had asked to vacate the hearing and in “not setting a new hearing and giving [him] proper notice” of it. Although Smith included the facts underlying this argument in his petition for special action below, he advanced no related legal argument. He, therefore, has waived that argument on appeal. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007) (arguments raised for first time on appeal waived). Smith further asserts special action jurisdiction was appropriate because the justice court “deprived [him] of his constitutional rights of due process” by holding the OSC hearing in his absence and denying his motion to dismiss the forfeiture action. But, again, Smith did not raise this issue in his petition for special action, and we will not address it. *See id.*

¶8 Even assuming the superior court had these items before it, they are not included in the record on appeal. “A party is responsible for making certain the record on appeal contains all . . . documents necessary for us to consider the issues raised on appeal,” and “[w]hen a party fails to include necessary items, we assume they would support the [superior] court’s [ruling].” *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). On the record before us, therefore, despite the parties’ apparent agreement on the underlying facts, because the specific relevant documents are not in our record, we cannot say the superior court abused its discretion in declining special action jurisdiction.

¶9 Accordingly, we affirm the superior court’s order declining jurisdiction of Smith’s special action.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge